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No. 02-1315

IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

Solidarity Center for Law and Justice, P.C. is a professional corporation organized under the laws of the State of Georgia for the promotion of social welfare by defending human and civil rights secured by law, to wit: those individual liberties, freedoms, and privileges involving human dignity that are either specifically guaranteed by the U. S. Constitution or by a special statutory provision coming directly within the scope of the 13th or 14th Amendment, some other comparable constitutional provision, or that otherwise fall within the protection of the Constitution by reason of their long established recognition at the common law as rights that are essential to the orderly pursuit of happiness by free men and women. When permitted by court rules and practice, Solidarity Center for Law and Justice, P.C. files briefs as *amicus curiae* in litigation of importance to the protection of human and civil rights, particularly when the primary right of parents to direct the upbringing of their children in accordance with the dictates of their consciences is at issue.

Many theology majors at postsecondary educational institutions in the State of Washington are future religious leaders who will provide counseling, educational, and social services to Washington citizens. By depriving certain theology majors equal access to publicly-funded Promise Scholarships, the State of Washington abridges the classroom discourse through which these aspiring religious leaders gain important insights regarding the present condition of, and means for improving, individual lives and society. Yet, there is no

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[1] All Petitioners and Respondent have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36. Counsel for the *amicus curiae* authored the brief in its entirety. No person or entity, other than the *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of the brief.

evidence that theology majors, their professors, or their mentors in faith-based counseling, educational, and social service organizations are engaging in constitutionally proscribable speech or conduct that poses a threat to democratic institutions. This Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit that it is unconstitutional to deny a Promise scholarship to an otherwise qualified student because the student decides to pursue a theology degree from a religious perspective.

SUMMARY OF ARGUMENT

Democratic evolution, the advancement of human society through deliberative discourse among citizens holding competing visions of the common good and the means of its promotion, depends on freedom of thought. "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S.Ct. 1389, 1403 (2002).

The thoughts to which America's college and university students are exposed determine the course of our democracy. This Court "[has] repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society." *Grutter v. Bollinger*, ___ U.S. ___, 123 S.Ct. 2325, 2340 (2003) (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

For this reason, in a pluralist democratic society, it is essential that postsecondary educational institutions be open to competing viewpoints of the best means for maintaining the fabric of society. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence

in the openness and integrity of the educational institutions that provide this training." *Grutter*, 123 S.Ct., at 2341. It is no less the case that, absent conduct that presents a threat to the well-being of a democratic society, the path to leadership must be visibly open to talented and qualified individuals of every *religion*.

Because of nineteenth century political, philosophical, and professional fears relating to the effect of Roman Catholic immigrants on the fabric of American society, the State of Washington, together with many other states, enacted broad prohibitions "aimed at the suppression of ideas thought inimical to the Government's own interest." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 549 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983); *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).[2] These so-called Blaine Amendments[3] were relied upon to

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[2] Wash. Const. art. I, § 11, adopted in 1889, provides in pertinent part that: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."

[3] In December 1875, a Republican member of the House of Representatives and Presidential hopeful, James G. Blaine, introduced the following proposed constitutional amendment:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. 4 Cong. Rec. 205, 44th Cong. (1st Sess. 1875).

The bill was defeated in its final form; however, the objective was partially attained with regard to the later states (including Washington) admitted into the Union through enabling acts which required them to adopt ordinances guaranteeing the establishment of public schools "free from sectarian control." See Jorgenson, *The State and the Non-Public*

manipulate government funding in a manner that "resulted in the imposition of a disproportionate burden calculated to drive 'certain ideas or viewpoints from the marketplace.'" *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

By relying on its Blaine Amendment to deny Promise scholarships to certain theology majors, the State of Washington abridges private teacher-student discourse on the maintenance of the fabric of society from a religious perspective. Such abridgement distorts the postsecondary educational medium of expression by altering the traditional role of teachers and students "in much the same way broadcast systems or student publication networks were changed in the limited forum cases" decided by this Court. *Velazquez*, 531 U.S., at 544.

In many instances, students who graduate with theology degrees provide faith-based counseling, educational, and social welfare services that are not logically "different in kind" from the services offered by Promise scholarship students who graduate with degrees in social work, education, or psychology. *Good News Club v. Milford Central School*, 533 U.S. 98, 111 (2001). Nevertheless, students who enroll in theology degree programs that approach these vocations from a purely religious viewpoint are denied Promise scholarships.

By denying Promise scholarships to certain theology majors, the State of Washington uses a viewpoint-based restriction to regulate private expression between teachers and students in a manner that is aimed at suppressing the interchange of ideas for bringing about political and social changes thought inimical to the State of Washington's own

School, 1825-1925, 138-139 (1987); Gabel, *Public Funds for Church and Private Schools*, 524-525 (1937).

interests. In the absence of evidence that theology degree candidates and their professors are engaging in constitutionally proscribable speech, such regulation of private expression violates the First Amendment to the United States Constitution.

ARGUMENT

I. BY DENYING PROMISE SCHOLARSHIPS TO THEOLOGY MAJORS, THE STATE OF WASHINGTON USES A VIEWPOINT-BASED RESTRICTION TO REGULATE PRIVATE EXPRESSION IN A MANNER THAT IS AIMED AT SUPPRESSING THE INTERCHANGE OF IDEAS THOUGHT INIMICAL TO THE GOVERNMENT'S OWN INTERESTS.

The State of Washington denies Promise scholarships to theology majors who choose to engage in classroom discourse with their professors regarding how to maintain the fabric of society through faith-based counseling, educational, and social welfare services.[4] To deny public aid to students "who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Speiser*, 357 U.S., at 518. By imposing such a penalty on theology majors, the State of Washington regulates private expression in a manner that is aimed at suppressing the interchange of ideas for bringing about political and social changes thought inimical to the State of Washington's own interests in maximizing the material wealth of its citizens and the growth of its economy.

[4] A declared major in theology disqualifies a student from receipt of a Promise Scholarship *only* when the subject is taught from a perspective that is "devotional in nature or designed to induce religious faith." Brief for Petitioners, 6.

A. The Promise Scholarship Program is Designed to Facilitate Private Speech, Not to Promote a Governmental Message.

Within broad limits, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). In *Rust*, Congress had appropriated federal funding for family planning services and forbidden the use of such funds in programs that provided abortion counseling. *Id.*, at 178. Recipients of these funds challenged this restriction, arguing that it impermissibly conditioned the receipt of a benefit on the relinquishment of their constitutional right to engage in abortion counseling. *Id.*, at 196. This Court rejected that claim, recognizing that "the Government [was] not denying a benefit to anyone, but [was] instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* See also *United States v. American Library Association, Inc.*, ___, U.S. ___, 123 S.Ct. 2297 (2003).

Relying on its analysis in *Rust*, in *American Library Association*, this Court rejected a challenge to a restriction on the government funding of Internet access in public libraries. This Court held that "Congress may certainly insist that these 'public funds be spent for the purposes for which they were authorized,'" which excluded pornographic material. *American Library Association*, 123 S.Ct., at 2308 (quoting *Rust*, 500 U.S., at 196).

The restrictions on government subsidy programs permitted under *Rust* and *American Library Association* may not be proper with respect to government subsidy programs that are "designed to facilitate private speech, not to promote a governmental message." *Velazquez*, 531 U.S., at 542. This Court has articulated two features of a government subsidy program that indicate the facilitation of private speech: i) the government-funded speaker serves as an independent advisor

or advocate for the ultimate beneficiary of the government subsidy, and ii) "the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." *Id.*, at 543. These two features exist in the present case.

B. A Teacher at a Postsecondary Educational Institution Serves as an Independent Advisor and Advocate for Students With Whom the Teacher Engages in Educational Discourse.

The academic freedom enjoyed by teachers at postsecondary educational institutions is critical to maintaining the fabric of American society. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

it is this academic freedom that enables teachers and students to freely engage in private speech regarding the present social, economic, or legal order of society; to question or criticize the wisdom of the decision-making machinery of government and its leaders; to exchange theories for improving the material and spiritual conditions of society; and to advocate for political and social change.

The subject matters of private classroom discourse between teachers and their student theology majors may include: the ethical duties of business owners and employees in a post-Enron world; the religious implications of globalization and the treatment of workers and the environment in third-world nations; or the spiritual and psychological effects on individuals who lose their jobs during an economic downturn.[5] In discussing all of these real-life scenarios, teachers may

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[5] *See* Elizabeth Bernstein & Peter Landers, "For the Clergy, Flock's Troubles Become Their Own," *The Wall Street Journal*, July, 31, 2003.

encourage their theology students to challenge the status quo in ways that government and business officials think are inimical to existing business practices and the economic well-being of society. To challenge the status quo, students must be encouraged to disassociate, at least hypothetically, from the status quo. "Those who use the power of the state always desire to preserve a certain given order of things. They therefore always try to persuade or compel their subjects to accept, as right and reasonable, certain solutions (hardly ever the best) of the outstanding problems of politics and economics." Aldous Huxley, *Ends and Means*, 218 (1937).

It is the potential for challenging the status quo through private expression that places postsecondary educational discourse within the same category of private expression subsidized by the government in the indigent legal services program examined in *Velazquez*. As noted by this Court: "In the specific context of §504(a)(16) suits for benefits, an LSC-funded attorney speaks on the behalf of the client against the government for welfare benefits. The lawyer is not the government's speaker. . . . The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*." *Velazquez*, 531 U.S., at 542-543.

In *American Library Association*, this Court affirmed the vital "advisor and advocate" distinction between private speakers as existed in *Velazquez* and the present case and government speakers as existed in *Rust*. It observed that, in the context of the publicly-funded legal assistance program in *Velazquez*, "the role of lawyers who represent clients in welfare disputes is to advocate *against* the Government, and there was thus an assumption that counsel would be free of state control." *American Library Association*, 123 S.Ct., at 2309 (citing *Velazquez*, 531 U.S., at 542-543). In contrast,

public libraries, "have no comparable role that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." *Ibid.* (footnote omitted).

The government-subsidized speakers in *Rust* were the staff and volunteers of public or nonprofit private entities whose role under Title X of the Public Health Service Act was "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of *acceptable* and *effective* family planning methods and services." 42 U.S.C. 300a. (emphasis added). Under federal regulations promulgated by the Secretary of Health and Human Services, the only "acceptable" and "effective" family planning methods and services which could be discussed with program clients would be those relating to preventive family planning services. *Rust*, 500 U.S., at 179.

While some State of Washington government and business leaders might prefer that college and university teachers engage in only "acceptable" and "effective" discourse in accordance with prescribed regulations, the benefits accruing to our democracy from the exercise of academic freedom dictate otherwise. "In our system [of public education], students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969).

Likewise, postsecondary teacher-student classroom discourse does not fall within the same category as the government-regulated Internet speech at issue in *American Library Association*. According to this Court, a public library "provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and

recreational pursuits by furnishing materials of requisite and appropriate quality." *American Library Association*, 123 S.Ct., at 2299 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995)). Teachers at post-secondary educational institutions do not merely show up for class, pull out a stack of books for student perusal, and then sit silently for an hour while their students engage in self study.

Postsecondary teachers are advisors and advocates for their students; thus, private expression is critical to the educational relationship. Through the Promise Scholarship Program, the State of Washington does not fund mere *information*; it funds the *instigation* of economic, legal, and social thought, expression, and conduct. Through viewpoint-discriminatory *regulation*, the State of Washington distorts an education forum traditionally used for instigation into one used for *dictation*. In doing so, the State attempts to turn an Ivory Tower into a Tower of Babel, with students being rewarded for pursuing government-approved degrees that speak the one tongue of economic prosperity.

C. The State of Washington Seeks to Use the Postsecondary Educational Institution Medium of Expression and to Control It, Through Viewpoint Discrimination in the Case of Theology Majors, in a Way That Distorts Its Usual Functioning.

The purpose of the Promise Scholarship Program "is to help low and middle income students reap the economic benefits of a college education." Brief for Petitioners, 47. In achieving this purpose, the State of Washington denies Promise scholarships to students who use the medium of the State's postsecondary educational institutions to pursue a theology degree from a religious perspective. "Where the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining

whether a particular restriction on speech is necessary for the program's purposes and limitations." *Velazquez*, 531 U.S., at 543.

The accepted usage of the postsecondary classroom is as a center for the expression of competing viewpoints about "maintaining the fabric of society." *Grutter*, 123 S.Ct. at 2340. "The classroom is peculiarly the 'marketplace of ideas.' The Nations's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F.Supp. 362, 372 (1943)).

In the present case, the State of Washington seeks to improve the economic livelihood of its low and middle income citizens by subsidizing private teacher-student discourse at postsecondary educational institutions in the State. By penalizing the expression of religious viewpoints by theology majors, the State of Washington distorts the post-secondary educational medium of expression by handicapping the access of students to the traditional role that a teacher has as an advisor and advocate regarding possible changes in the political and social order. As the Promise Scholarship Program "involves a subsidy, limited forum cases such as *Perry*, *Lamb's Chapel*, and *Rosenberger* may not be controlling in a strict sense, yet they do provide some instruction." *Velazquez*, 531 U.S., at 544 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819).

In *Rosenberger*, this Court struck down a University of Virginia policy that authorized the payment of outside contractors for the printing costs of a variety of student publications but withheld any authorization for payments pertaining to a student paper that "primarily promotes or manifests a particular belie[f] in or about a deity or an

ultimate reality." *Rosenberger*, 515 U.S., at 825. This Court expressed two concerns regarding such viewpoint discrimination:

> The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background of tradition of thought and experiment that is at the center of our intellectual and philosophical tradition.

Id., at 835. By awarding Promise scholarships to all qualifying low and middle income students except those who intend to base their postsecondary education on a purely religious ultimate idea, the State of Washington engages in viewpoint discrimination that is detrimental to democratic discourse. "For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses." *Ibid.*

This Court has expressed its disapproval over the regulation of speech that is designed to penalize viewpoints deemed "quintessentially religious" or "decidedly religious in nature" by government officials. See *Good News Club*, 533 U.S., at 111. In *Good News Club*, this Court held it to be an unconstitutional abridgement of free speech for a municipality, which had opened its public school classrooms to promote the moral and character development of children from a religious *perspective*, to deny such access to a Good News Club to do so in the form of religious *instruction* itself. This Court chose to "reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum

on the ground that the subject is discussed from a religious viewpoint." *Id.*, at 111-112.

Because the State of Washington is funding private teacher-student speech, not government speech, the viewpoint discrimination analysis of *Good News Club* is instructive. A Pastoral Ministries major at Northwest College (the college attended by Respondent) "is designed to prepare students for a career as a Christian minister." *Davey v. Locke*, 299 F.3d 748, 751 (9th Cir. 2002). In many cases, a Christian minister can be expected to be responsible, either directly or in a supervisory capacity, for youth counseling and character education, marriage counseling, lifeskills management counseling, effective parenting counseling, substance abuse counseling, and immigrant outreach and advocacy services.[6] Regardless of these important social functions that Pastoral Ministries majors may perform once they enter the workplace, the State of Washington denies them Promise scholarships because their education constitutes "religious instruction." Yet, Promise scholarships are awarded to students attending the School of Social Work at the University of Washington who, upon graduation, will perform many of these same functions.[7]

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[6] A recent study confirmed that:

> Churches and religious groups offer a vast array of services to their local communities, programs that sometimes are not being provided elsewhere. A few years ago, Catholic Charities in New York did a taxonomy of publicly-funded social services it provided through its network. After-school programs, refugee settlement, homeless shelters, food banks—they stopped counting at 197.

Joseph Laconte & Lia Fantuzzo, "Churches, Charity and Children: How Religious Organizations Are Reaching America's At-Risk Kids," p. 7 (2002).

[7] The following is the Mission Statement of the University of Washington School of Social Work:

> As members of the University of Washington School of Social Work, we commit ourselves to promoting social and economic

It is clear that the State of Washington is engaging in viewpoint discrimination with respect to the Promise Scholarship Program. Students who major in social work with the career goal of maintaining the fabric of society by counseling, educating, or otherwise serving individuals, families, and communities from a secular viewpoint receive Promise scholarships. Yet, students who major in theology (i.e. Pastoral Ministries) with the career goal of maintaining the fabric of society by providing the same kind of services from a religious viewpoint are denied Promise scholarships. There is "no logical difference in kind" between the invocation of Christianity by Christian ministers who provide or supervise faith-based counseling, education, and social services, and the invocation of principles of social and economic justice and human capacities for problem solving by secular counselors, educators and social workers to provide a foundation for their work. *Good News Club*, 533 U.S., at 111. This Court has never reached the conclusion

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justice for poor and oppressed populations and enhancing the quality of life for all. We strive to maximize human welfare through:

- Education of effective social work leaders, practitioners and educators who will challenge injustice and promote a more humane society, and whose actions will be guided by vision, compassion, knowledge and disciplined discovery, and deep respect for cultural diversity and human strengths;
- Research that engenders understanding of complex social problems, illuminates human capacities for problem-solving, and promotes effective and timely social intervention; and
- Public service that enhances the health, well-being, and empowerment of disadvantaged communities and populations at local, national, and international levels.

We embrace our position of leadership in the field of social work and join in partnership with others in society committed to solving human problems in the twenty-first century.

University of Washington School of Social Work, "The Mission Statement," http://depts.washington.edu/sswweb/mission.html (2003).

that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Ibid.*

Government regulation of private thoughts and expression through viewpoint discrimination only can be sustained in the face of a compelling state interest, and, even then, the regulation must be narrowly tailored to achieve the state interest. Despite historical fears, embodied in Article I, § 11 of the Washington Constitution, that government-subsidized Catholic educational and social services would be inimical to maintaining the fabric of American society, the State of Washington's denial of Promise scholarships to students pursuing a degree in theology is an abridgement of teacher-student private expression that is not narrowly tailored to address a legitimate compelling State interest.

II. THE VIEWPOINT DISCRIMINATION ENGAGED IN BY THE STATE OF WASHINGTON IS NOT NARROWLY TAILORED TO PROSCRIBE UNLAWFUL ADVOCACY OR ANY OTHER VIOLENCE-INCITING EXPRESSION ON THE PART OF STUDENTS PURSUING THEOLOGY DEGREES.

This Court has noted that "our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383 (1992) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Article I, § 11 of the Washington Constitution (hereinafter referred to as the "Washington Blaine Amendment") manifests the sentiment, held by many influential political, educational, and social leaders at the time the Washington Blaine Amendment was adopted, that Catholic religious expression could be so categorized.

The sweeping scope of the Washington Blaine Amendment's prohibition on the appropriation of public money or property for *any* religious worship, exercise, or instruction (even in cases where comparable secular activities are publicly funded) blurs the distinction, recently articulated by this Court, between engaging in "constitutionally proscribable" speech and engaging in "core political" speech. *Virginia v. Black*, ___ U.S. ___, 123 S.Ct. 1536, 1551 (2003). Such a prohibition "chills constitutionally protected political speech because of the possibility that the State" will penalize via viewpoint discrimination in the postsecondary educational speech forum, "somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Ibid.*

A. The Washington Blaine Amendment is Not Narrowly Tailored to Abridge Only Speech That Falls Within the Traditional Categories of Constitutionally Proscribable Speech.

This Court recognizes three categories of constitutionally proscribable speech.

First, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S., at 572. Such fighting words—"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"—are generally proscribable under the First Amendment. *Virginia v. Black*, 123 S.Ct., at 1547 (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)).

Secondly, the First Amendment allows a State to forbid or proscribe advocacy of the use of force or of law violation "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447

(1969) (*per curiam*). The proscription of such advocacy lessens the likelihood of "coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

Thirdly, the First Amendment permits a State to ban a "true threat." *Watts v. United States*, 394 U.S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 123 S.Ct., at 1548 (citing *Watts*, 394 U.S., at 708; *R.A.V.*, 505 U.S., at 388).

Petitioners have presented no evidence that the postsecondary educational speech of theology students and their teachers falls within any of the three constitutionally proscribable categories of speech. The State of Washington relies on the presumption, implicit in the Washington Blaine Amendment, that teaching theology from a purely religious perspective constitutes constitutionally proscribable speech. Such a presumption, based solely on historical political, philosophical, and professional fears relating to the possible negative influence of Roman Catholicism on the fabric of American society, is an unconstitutional one.

In *Virginia v. Black*, this Court struck down a Virginia statute that made it a felony to burn a cross on the property of another with the intent of intimidating any person or group. This Court did so because the statute made any such burning prima facie evidence of an intention to intimidate a person or group. "The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate." *Virginia v. Black*, 123 S.Ct., at 1551. Thus, "the provision permits the Commonwealth to arrest, prosecute,

and convict a person based solely on the fact of cross burning itself" without considering whether the evidence supported a finding that the intent of the cross burning was not to intimidate but to make "a statement of ideology, a symbol of group solidarity." *Id.*, at 1550-1551.

The Washington Blaine Amendment emanates from the nineteenth century belief that the Roman Catholic faith was a political, philosophical, and professional threat to maintaining the fabric of American society. In part, this anti-Catholic bigotry was attributable to statements of ideology and symbols of group solidarity expressed and practiced by Catholic immigrants and their leaders. In this respect, the Washington Blaine Amendment gives rise to the most unjust of results: individuals who use a burning cross to engage in one of the world's most notorious practices of racial and ethnic hatred against humanity cannot be presumed to have done so with an intent to intimidate; yet, theology majors who choose to devote their postsecondary educational careers to examining of the role of the Cross in service to humanity are presumed to intend to establish a religion unjustifiably feared to undermine the fabric of American society.

The Washington Blaine Amendment fails to require the production of contextual evidence to determine whether theological classroom speech is constitutionally proscribable through viewpoint discrimination or, alternatively, is constitutionally protected core political speech that requires equal access to public funds. This Court has held "that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser*, 357 U.S., at 528-529.

In *Speiser*, this Court dealt with the alleged unlawful advocacy against the government which might result from failing to secure a signed loyalty oath from veterans claiming

a veterans' property tax exemption provided under the California Constitution. This Court determined that the State of California had not produced sufficient proof of the potential for unlawful advocacy against the government that would justify the inhibition of the right of veterans to speak freely. This Court rejected the argument of the State of California "that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State." *Id.*, at 528. In the opinion of this Court, if sufficient evidence existed to show that, as a class, veterans were "persons supposed to be dangerous" in the manner of misusing a position of trust "to the detriment of the public," then the State of California would have been justified in compelling, through denial of a property tax exemption, veteran applicants to sign a loyalty oath. *Id.*, at 527.

If there is evidence that a theology major has engaged in constitutionally proscribable speech, the State of Washington can act against the theology major "only as it can act against any other citizen, by imposing penalties to deter the unlawful conduct." *Id.*, at 528. Until such conduct arises, the State of Washington "clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." *Id.*, at 529.

In *Speiser*, this Court ruled that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Id.*, at 519 (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950)). Likewise, the denial of Promise scholarships to otherwise scholarship-eligible theology majors is aimed at the suppression of dangerous ideas, "ideas thought inimical to the Government's own interest." *Velazquez*, 531 U.S., at 549 (citing *Regan v. Taxation With Representation of Wash.*, 461

U.S., at 548; *Speiser*, 357 U.S., at 519). This Court's First Amendment cases "draw vital distinctions between words and deeds, between ideas and conduct." *Free Speech Coalition*, 122 S.Ct., at 1403.

B. The Washington Blaine Amendment Chills Constitutionally Protected Core Political Speech.

History evidences that the adoption of the Washington Blaine Amendment resulted from a perfect storm of anti-Catholic sentiment emanating from three religious groups: Nativist Protestants, Secularist Freethinkers, and Positivist Progressives. Respectively, these three groups had political, philosophical, and professional fears regarding the relationship between the Roman Catholic Church and a growing immigrant Catholic population in America. These fears resulted in an effort to eliminate the likelihood that Catholic institutions would have equal access to public funds for the conduct of counseling, educational and social welfare services and the core political speech relating thereto.

Nativist Protestants had *political* concerns regarding the growing power of immigrant Catholics and the Catholic Church hierarchy in America. As early as 1856, the fear was widely expressed that Roman Catholic bishops in America:

> secure the best and most productive real estate in our large cities, they support missions in a country flooded with Gospel light, they penetrate the wilderness, and are enabled to compass sea and land, not to preach the Gospel of Christ, but to build up a colossal power which shall be felt in the political world, and which shall enable the Church of Rome to control and shape the destinies of the sons of Pilgrims.

Justin Fulton, *The Outlook of Freedom: or The Roman Catholic Element in American History*, 200 (1856).

The fifth article of the Platform of the American Party, adopted by its National Council on February 21, 1856,

provided that "No person should be selected for political station (whether of native or foreign birth) who recognizes any allegiance or obligation of any description to any foreign prince, potentate, or power, or who refuses to recognize the Federal and State Constitutions (each within its sphere) as paramount to all other laws, as rules of political action." James Chapman, *American versus Romanism; or The Cis-Atlantic Battle between Sam and the Pope*, vii, (1856).

In the view of this Court, "the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts." *McDaniel v. Paty*, 435 U.S. 618, 629 (1978). Absent evidence to the contrary, one must likewise assume that the American experience provides no persuasive support for the fear that those studying at State of Washington postsecondary educational institutions to become pastors or religious counselors or educators will seek to establish an anti-democratic theocracy in America.

The epicenter of anti-Catholic activity on the part of Nativist Protestants was in the area of education. In their opinion, the Catholic education of European immigrants was a threat to the fabric of American society which could be averted only through the creation of locally-controlled, publicly-funded common schools. The common school was viewed as "the principal digestive organ of the body politic" designed to "Americanize the children of immigrants." Rev. Josiah Strong, *Our Country: Its Possible Future and Its Present Crisis*, 92 (1891). Of course, the Americanization of children required Protestant religious instruction in the common school.[8]

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[8] As early as 1852, it was observed that:

> The son of an Irishman, a Frenchman, or Italian is an American, and he will not be a Romanist. We have a mill, of which the common

Meanwhile, Secularist Freethinkers had *philosophical* differences with Roman Catholics that required the elimination of all public financial support for Catholic educational and social welfare services. "To a world dominated by religious sentiment, [freethinkers] would offer one in which the spirit of scientific inquiry would prevail; instead of superstition, rational thought; and in place of the supernatural, the natural." Sidney Warren, *American Freethought, 1860-1914*, 20-21 (1966).

The objectives of the American secularists were given formal expression in the "Nine Demands of Liberalism" which were first published in 1872 and which included, among other things, that "all public appropriations for sectarian, educational and charitable institutions should be discouraged." *Id.*, at 161-162. The achievement of the "Nine Demands of Liberalism" was one of five goals pursued the National Liberal League, formed at a national assembly of secularists held on July 4, 1876, twenty-three years prior to the adoption of the original Washington Constitution. Throughout the 1880s, many localities of a sizeable population had in their midst a local chapter of the Liberal League that was "primarily concerned with discussing the question of church interference with secular life." *Id.*, at 30-31.

During the 1880s, the "high priest of the [freethought] movement was Robert Green Ingersoll." *Id.*, at 37. According to Ingersoll in a speech delivered on January 29, 1872, freethinkers were "laying the foundations of the grand temple of the future" wherein "with appropriate rites, will be

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> school is the nether, and the Bible and its institutions the upper stone; into this mill let us cast the people of all countries and forms of religion that come here, and they will come out of the grist American and Protestants. And the highest wisdom of our country is to keep this mill in vigorous operation.

Kirwan, *Romanism at Home: Letters to the Hon. Roger B. Taney, Chief Justice of the United States*, 249-250 (1852).

celebrated the religion of Humanity" when "REASON, throned upon the world's brain, shall be the King of Kings, and God of Gods." Robert Ingersoll, "The Gods," *On the Gods and Other Essays*, 56 (1990). It was the Secularist Freethinker Ingersoll who gave the famous "Plumed Knight" speech in support of the Presidential nomination of his close friend, U.S. Senator James G. Blaine, at the 1876 Republican National Convention. In the speech, Ingersoll remarked that the Republicans of the United States "demand a man who believes in the eternal separation and divorcement of church and school." Robert Ingersoll, "Speech at Cincinnati," *The Works of Robert G. Ingersoll*, Vol. 9, 58 (1900). Blaine narrowly lost the Presidential nomination to Rutherford B. Hayes.

During September of 1868, Ingersoll and Blaine had forged a friendship during a two-week Ingersoll speaking tour in Maine arranged at Blaine's insistence. It is likely that, over the course of their seven-year friendship prior to Blaine's 1875 campaign for a Constitutional ban on the allocation of public school funds to religious institutions, Ingersoll (one of history's most persuasive orators) influenced Blaine to adopt a strictly secularist attitude toward the public financing of education. By 1875, Blaine had earned a national reputation as a Republican political leader who well understood the importance of using the "Catholic question" against the Democratic Party.[9]

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[9] In 1875, the Republican candidate for governor of Ohio, Rutherford B. Hayes (afterward President), made the Catholic question part of his campaign. He wrote to James Blaine from his home in Fremont: "The secret of our enthusiastic convention is the school question. . . . We have been losing strength in Ohio for several years by emigration of Republican farmers. . . . In their place have come Catholic foreigners. Last year . . . they had 17,000 majority. . . . In the cities this spring, we are still more decisively beaten. . . . We shall crowd them on the school and other State issues." Richard Gabel, *Public Funds for Church and Private Schools*, 485, fn. 28 (citing Gail Hamilton, *Biography of James G. Blaine*,

Finally, Positivist Progressives in late nineteenth-century America had *professional* differences with the Roman Catholic Church. Positivism, a socio-religious philosophy founded by Auguste Comte in France during the mid-nineteenth century, sought to provide an empirical and naturalistic methodology for social reconstruction. "One of the most neglected currents in the American context has been the positivism of Auguste Comte." Gillis Harp, *Positivist Republic: Auguste Comte and the Reconstruction of American Liberalism, 1865-1920*, 10 (1995). From the American Positivist perspective, only social science could bring order to a post-Civil War civilization suffering from the chaos wrought by the dual forces of individualistic, laissez-faire capitalism and superstitious Christian faith. The influence of the Roman Catholic Church was an anathema to Progressive social scientists eager to tame the urban masses through the application of empirical research and scientific methods.

One of America's first social scientists, Lester F. Ward, was a strong adherent of Positivism. Ward's "government service bolstered his confidence in the ability of the bureaucratic state to manage society and solve problems" *Id.*, at 118.[10] Through his years in government service, "Ward saw government-sponsored scientists and bureaucrats pursuing research and offering expert advice to policymakers." *Ibid.* During the decade of the 1870s:

> The philosophy that underlay the Washington [D.C.] community blended a positivist empiricism with a naïve scientism and a bureaucratic elitism. Members of the circle were concerned with finding and collecting a mass

373 (1895), C. R. Williams (ed.), *Diary and Letters of Rutherford Birchard Hayes*, III, 271-281 (1924)).

[10] Ward landed a job in May 1865 as an accounts clerk within the Treasury Department. The new federal Bureau of Statistics hired him in 1867 and he became librarian of the Bureau five years later. Ward joined the newly created Geological Survey in 1881.

> of varied data about their society. To find out more about the republic and to collate systematically this vast body of knowledge was seen as an important civic duty. Such men viewed science as more than just an empirical method; science was a progressive and integrating worldview that implied social improvement and reform.

Id., at 121. However, progress in the new field of social science in the 1870s had required a hostile attitude toward theology in the preceding decade.

During the 1860s, Lester Ward, with a few office friends, had formed the National Liberal Reform League—a secret secularist organization dedicated to the refutation of "the leading doctrinal teachings of the so-called Catholic and Evangelical Protestant Churches." *Id.*, at 123 (quoting Clifford Scott, *Lester Frank Ward*, 139 (1976)). The League's aim was to encourage the formation of affiliated groups in other cities and Ward appealed to all "Liberals, Skeptics, Infidels, Secularists, Utilitarians, Socialists, Positivists, Spiritualists, Deists, Theists, Pantheists, Atheists, [and] Free-thinkers." *Ibid.* (quoting Bernhard Stern, ed., *Young Ward's Diary*, 314-315 (1935)). According to Ward, secularism was equally important as science in securing social progress and only with an educational system "unfettered by theology" could the condition of the people be improved. Lester Ward, "The Situation," *Iconoclast*, 1 (March 1870).

Yet Ward, and the Positivist Progressives that followed him, recognized that the dictates of social order required them to "search for a secular surrogate for traditional Christian faith." Harp, *Positivist Republic* 125. Ward "showed a singular enthusiasm for the religious implications of scientific truths. . . Via scientism, then, social progress was substituted for a personal god as the object of worship." *Ibid.*

For one of America's renowned social scientists, Herbert Croly, the search for a secular religious substitute for

Christianity ended with the conclusion that "American democracy can be advanced only by an increasing nationalization of the American people in ideas, in institutions, and in spirit." Herbert Croly, *The Promise of American Life*, 271 (1909). For Croly, as for Comte and Ward before him, it was only through a Positivist priesthood of elite civil service technocrats that these national ideas and institutions could be realized: "A democracy cannot dispense with the solidarity which it imparted to American life, and in one way or another such solidarity must be restored." *Id.*, at 139.

Thus, throughout the late nineteenth and early twentieth centuries, Nativist Protestants, Secularist Freethinkers, and Positivist Progressives supported legal and regulatory efforts designed to abridge the core political speech of Roman Catholic immigrants and their leaders. As planned, the resulting constitutional prohibitions and limitations on public funding of faith-based counseling, educational, and social welfare services placed the Catholic Church and other faith-based organizations at competitive disadvantage in the face of a rapidly expanding government-funded welfare state.

In the absence of constitutionally proscribable speech, a level playing field must be "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). By tilting the playing field in favor of students who are willing to pursue secular counseling, education, or social work degrees from postsecondary educational institutions, the State of Washington provides non-theistic scientific or ethical viewpoints with a discriminatory advantage in the marketplace of ideas pertaining to the maintenance of the fabric of society. Such viewpoint discrimination penalizes aspiring religious leaders who might challenge the status quo by promoting theistic viewpoints regarding youth character education, marital and family relations, and economic, criminal, and environmental justice.

C. The State of Washington Has Produced No Evidence Which Justifies the Use of Viewpoint Discrimination as a Short-Cut Procedure to Suppress the Expression of Ideas for Political and Social Changes on the Part of Teachers and Students Engaged in Postsecondary Educational Discourse.

Some supporters of the Washington Blaine Amendment maintain that, "the Catholic Church had every right to advance its political positions, *Paty, supra.* But its opponents were not forced by the First Amendment into silence. They were entitled to respond vigorously to its efforts without being subsequently condemned as bigots." Brief of the American Jewish Congress, on behalf of itself, the American Federation of Teachers, the American Jewish Committee, and the Baptist Joint Committee on Public Affairs *Amici Curiae* 29. Unfortunately, the vigorous response adopted by the State of Washington and other states—the passage and implementation of broad prohibitions on the public funding of any religious worship, exercise, or instruction—went beyond the proscription of speech permitted under the First Amendment. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in light of the particular circumstances to which it is applied." *Speiser*, 357 U.S., at 520.

For those members of this Court inclined to consider cases decided by foreign courts relating to a government's abridgement of religious and political speech, the Grand Chamber of the European Court of Human Rights (hereinafter "ECHR") recently decided that Turkey had lawfully dissolved Refah Partisi (The Welfare Party). *Refah Partisi v. Turkey*, ECHR App. No. 41340/98 (2003).

Refah Partisi (hereinafter "Refah") was a political party founded on July 19, 1983. The results of the 1995 general election made Refah the largest political party in the Turkish parliament. On June 28, 1996, Refah came to power by forming a coalition government with the center-right True Path Party (*Dogru Yol Partisi*). According to an opinion poll carried out in January 1997, if a general election had been held at that time, Refah would have obtained 38% of the votes. The same poll predicted that Refah might obtain 67% of the votes in the general election to be held roughly four years later. *Id.*, at § 10. On January 16, 1998, the Turkish Constitutional Court dissolved Refah as a political party on the ground that it had become a "centre of activities contrary to the principle of secularism." *Id.*, at § 23. The ECHR upheld the dissolution in light of the evidence showing that (i) Refah intended to set up a plurality of legal systems, leading to discrimination based on religious beliefs; (ii) Refah intended to apply sharia [religious legal system] to the internal or external relations of the Muslim community within the context of this plurality of legal systems; and (iii) Refah members publicly advocated the possible recourse to force as a political method. *Id.*, at § 116.

Article 11 § 2 of the European Convention on Human Rights (hereinafter the "Convention") prohibits the placement of restrictions on the right to freedom of peaceful assembly and association "other than such as are prescribed by law and are *necessary in a democratic society* in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." (emphasis added). Due to the existence of "convincing and compelling reasons" showing that the dissolution of Refah and the forfeiture of political rights met a "pressing social need" and were "proportionate to the aims pursued," the ECHR determined that Refah's dissolution may be regarded

as "necessary in a democratic society." *Id.*, at § 135. The ECHR affirmed that a Contracting Party to the Convention "may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy."[11] *Id.*, at § 128.

It is clear that, under the First Amendment (and considering the non-binding comparative analysis set forth in *Partisi*), the State of Washington has provided no evidence of unlawful advocacy or other constitutionally proscribable speech on the part of theology students that would justify the imposition of a financial penalty that discriminates against their religious viewpoints on political and cultural changes necessary to maintain the fabric of society.

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[11] The ECHR's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" must concentrate on the following points:

> (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model society conceived and advocated by the party which was incompatible with the concept of a "democratic society."

Id., at § 104.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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